

United Nations Economic Commission for Europe

Extraordinary session of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)

Geneva, 19 April 2010

ACCESSION TO THE CONVENTION BY STATES FROM OUTSIDE THE UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE (UNECE) REGION (item 4 of the provisional agenda)

Note by the secretariat

1. At its twenty-third meeting (Geneva, 20 November 2009), the Bureau of the Meeting of the Parties (MoP) agreed that it would be useful to add to the agenda of the proposed extraordinary session of the MoP (ExMoP) an item on the consideration of expressions of interest in acceding to Convention by non-ECE countries. It requested the secretariat to bring its proposal to the attention of Norway, which was expected to formally request the convening of the ExMoP.

2. When requesting the convening of an extraordinary session of the MoP, Norway took up the suggestion of the Bureau and requested that the agenda for the session include an item on accession to the Convention by non-ECE States. Under this item, the Meeting is expected to consider any expressions of interest in acceding to the Convention received from specific non-ECE States, as well as to consider in a more general way the procedures relating to accession to the Convention by non-ECE States with a view to facilitating the achievement of the aforementioned goal in the strategic plan.

3. The Bureau requested the secretariat to prepare a discussion paper on this issue for consideration by the Meeting of the Parties.

I. LEGAL AND POLICY CONTEXT

4. The legal possibility for States from outside the UNECE region to become Parties to the Aarhus Convention is provided for in article 19, paragraph 3, of the Convention, which reads: "Any other State, not referred to in paragraph 2 above, that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties."

5. Over the years, the Parties to the Aarhus Convention have expressed their support for accession to the Convention by States from outside the UNECE region in various ways:

(a) In successive declarations, notably the Lucca Declaration of 2002 (see <http://www.unece.org/env/pp/documents/mop1/ece.mp.pp.2.add.1.e.pdf>, para. 33), the Almaty Declaration of 2005 (see <http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.1.e.pdf>,

para. 24) and the Riga Declaration of 2008 (see http://www.unece.org/env/pp/mop3/ODS/ece_mp_pp_2008_2_add_1_e_Riga.pdf, para. 23);

(b) - Through Decision II/9 of the Meeting of the Parties, where the Parties reiterated the invitation to non-ECE States to accede to the Convention and emphasised that "the approval of the Meeting of the Parties, as provided for in paragraph 3 of article 19 of the Convention, should not be interpreted as implying a substantive review, by the Meeting of the Parties, of that State's national legal system and administrative practices" (see <http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.13.e.pdf>, paras. 1 and 2);

(c) - In the Strategic Plan for 2009-2014, where the Parties set the goal that "States in other regions of the world effectively exercise their right to accede to the Convention. Parties actively encourage accession to the Convention by States of other regions of the world with the aim of, by 2011, having Parties which are not member States of UNECE" (see http://www.unece.org/env/pp/mop3/ODS/ece_mp_pp_2008_2_add_16_e_StPl.pdf, Objective II.4).

6. From these references, it is clear that there is strong support in principle for accession to the Convention by States from outside the UNECE region. However, little attention has been given to the question of how the words 'upon approval by the Meeting of the Parties' should be interpreted and implemented in practice, beyond the agreement that this should not be taken to imply a substantive review by the Meeting of the national legal system and administrative practices of prospective Parties from outside the ECE region.

7. The secretariat has been asked by representatives of non-ECE States about the procedure whereby such States may accede to the Convention. Such enquiries highlight the need for clarity about this issue.

II. OPTIONS FOR ADDRESSING THE ISSUE OF APPROVAL BY THE MEETING OF THE PARTIES

8. The process of acceding to an international treaty typically involves, sometimes over a period of several years, approval at domestic level by the government, parliament and president, after which the instrument of accession is submitted to the Depositary (the United Nations Secretary General, represented by the Treaties Section of the Office of Legal Affairs). The wording of article 19, paragraph 3, raises questions about the point in the process at which the approval of the Meeting should be sought and obtained; the form that the approval should take; and the level of government at which the interest should be expressed, and with what degree of certainty, in order to merit the attention of the MoP.

9. If a prospective Party from outside the UNECE region were to submit its instrument of accession to the Depositary without presenting any evidence that the MoP had approved its accession, there is a risk that the Depositary would not be able to register the State as a Party. The advance recognition of this possibility might in

itself act as a deterrent to prospective Parties. It would probably be an unacceptable risk for any State to go through all the domestic stages of the accession process without any certainty that its accession would be approved. Thus it makes sense for the approval to take place sooner rather than later in the sequence of events leading to accession.

10. On the other hand, if the interested State were to approach the MoP too early in the process, this too could carry some risks, in that even if the proposal to accede had the full support of the government, they would not at that stage have the certainty that the government's interest would receive the necessary support from the parliament or president.

11. As regards the level of government at which the interest in acceding is expressed, and the degree of firmness with which the interest is expressed, options may range from the least restrictive, such as provisional expressions of interest from officials at the operational level, to the most restrictive, namely a fullblown decision of the government. A provisional expression of interest signed by a Minister of the Environment would be an intermediate option.

12. If the Meeting of the Parties approves accession by non-ECE States on a case-by-case basis at its sessions, the fact that these typically take place at three-year intervals has certain implications. In any country, a process of building momentum towards accession to an international treaty is dependent upon the relevant officials becoming apprised of the issue and motivated to pursue it. The longer the process involved, the greater the likelihood of changes in personnel at all three levels (government, parliament, president) with consequent loss of momentum.

13. To date, the MoP has given the signal, through decision II/9, that its 'approval' should not be a heavyweight procedure. Nonetheless, if prospective Parties to the Convention must wait for up to three years after making a political decision to seek to accede, this will tend to reinforce the idea that the Convention is really an instrument for the ECE region and that as non-ECE States, they somehow have a secondary status. This in turn may reduce the prospects of the MoP meeting the goal in the strategic plan that "'States in other regions of the world effectively exercise their right to accede to the Convention".

14. It is clearly a political choice for the Parties as to how the requirement of approval should be interpreted. If there is a concern that the requirement of MoP approval might act as a deterrent to interested States and a wish to minimise any such deterrent effect, then various options are available. At one extreme, an amendment to the Convention could be introduced, deleting the words 'upon approval by the Meeting of the Parties'. This would bring the provision of the Convention into line with the corresponding provision of its Protocol, which was negotiated some five years later and which does not contain any requirement of MoP approval for accession by non-ECE States (Protocol on Pollutant Releases and Transfer Registers, article 26 in conjunction with article 24). Alternatively, the MoP could agree to introduce a procedure for intersessional decision-making on applications to accede, having regard to any implication arising from or for its rules of procedure. Setting a low or intermediate threshold for what constitutes a sufficient expression of interest to merit

the MoP's attention would be another way to simplify the process of approval and thus facilitate accession by non-ECE States.

III. EXPRESSIONS OF INTEREST BY PARTICULAR STATES

15. At its extraordinary session, the MoP is expected to consider any expressions of interest in acceding to the Convention by particular States from outside the UNECE region. Several representatives of non-ECE States have expressed to the secretariat a possible interest in their State acceding to the Convention. In some cases, these have the character of preliminary enquiries. In one case, a detailed explanatory note recommending accession to the Convention is being prepared by the head of the conventions unit for the Minister of the Environment. The secretariat has contacted the relevant officials seeking clarification on the current status within their government of the proposition to accede to the Convention, including whether it is at a point that it may be officially communicated to the MoP, and will provide an update on this at the ExMoP if not before.